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MAY - 6 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

May 6, 1993

**By Hand**

Donna R. Searcy  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

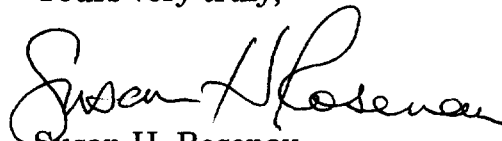
RE: MM Docket No. 93-42, Calistoga, California

Dear Ms. Searcy:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of its Reply in Support of Petition to Enlarge in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,

  
Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.  
Larry Miller, Esquire  
A. Wray Fitch, Esquire  
Administrative Law Judge Edward Luton

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Before The

**Federal Communications Commission**

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

2. Mr. Livermore's declaration was corroborated by his letter to Mary Constant dated March 6, 1993, which was appended to Moonbeam's motion as Exhibit A.

3. In opposition to Moonbeam's motion, Gary Willson has submitted the declarations of Gary Willson, his engineer Mel Freedman, and Len Pringle of Diablo Communications. In each of these declarations, it is stated that Mr. Pringle had, in fact, obtained consent from Mr. Livermore.<sup>1</sup>

4. Mr. Willson also submits a letter from Mr. Livermore to Mr. Pringle which states that he does not recall having received a call from Mr. Pringle seeking consent to Mr. Willson's proposed construction, and granting such consent.

5. It is clear that there exists in this matter a substantial and material issue of fact requiring a hearing on whether Gary Willson had reasonable assurance of site availability at the time his application was filed. Mr. Livermore does not recall giving consent to Mr. Willson's proposed construction, and his lack of recall extends almost back to the application's filing date. Further, as set forth in the Declaration of Elliot Klein submitted herewith as Exhibit 1, back in early March 1992, Mr. Pringle was making statements wholly inconsistent with his April 20, 1993 Declaration.

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<sup>1</sup>In fact, the only competent evidence Willson has presented on the issue of whether Mr. Pringle obtained consent from Putnam Livermore is the Declaration of Len Pringle himself, as he is the only person other than Mr. Livermore having personal knowledge of that fact. Section 1.229(d) requires that an enlargement petition *and any opposition thereto* must be based on specific allegations of fact which are supported by "affidavits of a person or persons having personal knowledge thereof." 47 C.F.R. 1.229(d).E.H. "Pepper" Schultz, 46 RR 2d 1441, 1443 (ALJ, January 17, 1980) (rejecting petition to add site availability issue based on telephone conversation with personnel of town planning department). *See also Dena Pictures, Incorporated*, 98 FCC 2d 675, 686, *recon. denied*, 98 FCC 2d 670 (Rev. Bd. 1984) (enlargement petition based on newspaper article rejected on hearsay grounds).

6. When in early March, 1992, Mr. Klein (who is Moonbeam's engineering consultant) spoke to Mr. Pringle regarding site availability for Moonbeam, Mr. Pringle explained that the site proposed by Mr. Willson was unavailable and that in the past 12 months, consent to use the site had not been requested by nor given to any party. Klein Declaration, *passim*.<sup>2</sup>

7. As the Commission and the District of Columbia Circuit have stated, "the determination of which factual version is indeed accurate is precisely the function of an evidentiary hearing," *Shirley Marchant*, 4 FCC Rcd 5241, 5242 (Rev. Bd. 1989), *citing California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 680 (D.C. Cir. 1985). Where, as here, there are "diametrically opposed and otherwise conflicting statements presented," a hearing must be convened. 4 FCC Rcd at 5242.

### **CONCLUSION**

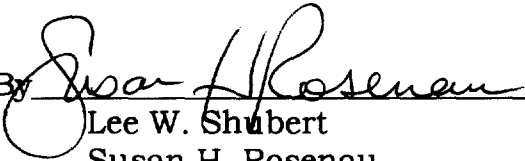
For the foregoing reasons, Moonbeam, Inc. respectfully requests that the issues in the captioned proceeding be enlarged as requested in its Motion, and that Gary Willson be ordered produce the supplementary discovery set forth in Exhibit B thereto.

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<sup>2</sup>Willson's opposition has brought into issue what Mr. Pringle said and did with respect to Willson's site request, *see* Pringle Declaration, *passim*. Moonbeam submits the Declaration of Elliot Klein as rebuttal to the matters raised by Willson, and as impeachment of Mr. Pringle's sworn declaration.

Respectfully submitted,

**MOONBEAM, INC.**

By   
Lee W. Schubert  
Susan H. Rosenau

Its Attorneys

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703/841-0606  
May 6, 1993

## **EXHIBIT I**

Before The  
**Federal Communications Commission**  
Washington, D.C. 20554

In re Applications Of	)	<b>Docket No. MM 93-42</b>
	)	
MOONBEAM, INC.	)	File No. BPH-911115MG
	)	
GARY E. WILLSON	)	File No. BPH-911115MO
	)	
For a Construction Permit for a	)	
New FM Station on Channel	)	
265A in Calistoga, California	)	

To: The Honorable Edward Luton  
Administrative Law Judge

**Declaration of Elliott Klein**

Elliott Klein, under penalty of perjury, declares as follows:

1. I make this declaration on the basis of personal knowledge.
2. I am a broadcast engineer employed by Moonbeam, Inc. I assisted Moonbeam in the preparation of its broadcast license application and in the selection of its transmitter site.
3. In connection with my efforts to assist Moonbeam in its selection of a transmitter site, on or about March 5, 1992, I spoke to Len Pringle, the Operations Manager for RDF Communications, and its subsidiary, Diablo Communications. Diablo Communications took over management of the tower sites from Telecommunications Properties (Watson Communications) on October 1, 1991.

4. According to Len Pringle, the sites RFD Communications manages for Diablo Communications are (a) the "North site" NL: 38° 40' 09" WL: 122° 37' 53" located in Sonoma County, California; and (b) the "South site" NL: 38° 39' 22" WL: 122° 36' 57" located in Napa County, California. The North site is the site proposed in Gary Willson's November 11, 1991 application. The two sites are approximately two kilometers apart. Mr. Pringle is known to me as the Operations Manager for both sites.

5. According to Mr. Pringle, he was not contacted by Gary E. Willson seeking permission to use any portion of the North site in connection with an application for a new FM broadcast station at Calistoga, California, nor was he contacted by A. Wray Fitch or Mel Freedman seeking permission to use any portion of the North site in connection with an application for a new FM broadcast station in Calistoga, California.

6. Mr. Pringle assured me that he had not given approval for use of the North site to any person in the last twelve months, and that as far as he knew, Diablo Communications had not given Gary E. Willson, A. Wray Fitch or Mel Freedman approval, permission or reasonable assurance of site availability for use of the North site with respect to an application for a new FM broadcast station in Calistoga, California.

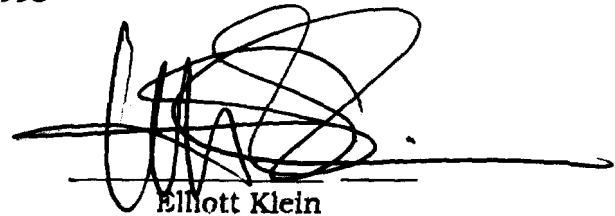
7. Mr. Pringle further stated that the North site could not at that time be used for an additional FM antenna, and that Diablo had no plans for allowing any further FM broadcast antennas at the North site. According to Mr. Pringle, the existing tower could not support any additional antennas. In addition, Mr. Pringle stated that he would not have given and had not given approval or permission for any party to



mount an antenna on the roof of the electronics communications equipment building located on the North site or to construct an additional tower on the North site.

I have read the foregoing, consisting of seven numbered paragraphs, and declare under perjury that they are true and correct to the best of my own personal knowledge and belief.

Executed this 4th day of May, 1993



Elliott Klein

CERTIFICATE OF SERVICE